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No.

In The
Supreme Court of the United States

October Term, 1980

GILA RIVER INDIAN COMMUNITY,
Petitioner,

v.

HENNINGSON, DURHAM & RICHARDSON,
and RANIER CONSTRUCTION COMPANY, INC.,
Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Petition for Writ of Certiorari)

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QUESTIONS PRESENTED

1. Do federal courts have "federal question" jurisdiction under 28 U.S.C. §1362 to hear a claim brought by an Indian tribe against non-Indian architect and contractor who negligently constructed a defective building on the tribe's reservation, making useless both the building and the Indian reservation land on which it is situated?

2. May a defendant avoid federal jurisdiction over injury to an Indian tribe's reservation because the same tortious act also constituted a breach of defendant's contractual obligations to the Indian tribe?

3. Should leave to file an amended complaint be freely granted?

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OPINIONS BELOW

The decision of the United States District Court of Arizona was rendered and filed on November 15, 1977. The Memorandum and Opinion is attached at page A-17 of the Appendix.

The Order of the United States District Court denying TRIBE's[1] motion for rehearing and refusing to grant TRIBE's motion for leave to file an amended complaint was entered and filed on December 12, 1977. The Order is attached at page A-22 of the Appendix.

The Opinion of the United States Court of Appeals for the Ninth Circuit was rendered and filed on August 29, 1980 and is reported at 626 F. 2d 708 (9th Cir. 1980). The Opinion is attached at page A-2 of the Appendix.

The Order of the United States Court of Appeals for the Ninth Circuit denying TRIBE's Petition for a Rehearing in Banc was entered and filed on December 4, 1980. The Order is attached at page A-16 of the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on August 29, 1980. On December 4, 1980 the Court of Appeals for the Ninth Circuit entered an order denying TRIBE's Petition for a Rehearing in Banc. The jurisdiction of this Court is invoked under Article III of the United States Constitution and under 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THE CASE

28 U.S.C. § 1331. Federal question; amount in controversy; costs

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[1] Gila River Indian Community (petitioner herein, plaintiff in the district court and appellant in the Court of Appeals for the Ninth Circuit), is herein denominated TRIBE.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

As amended Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721.

Act of December 1, 1980, Pub. L. 96-486, amended 28 U.S.C. § 1331 to read:

"§ 1331. Federal question

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States".

28 U.S.C. § 1362. Indian tribes

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Added Pub.L. 89-635, § 1, Oct. 10, 1966, 80 Stat. 880.

STATEMENT OF THE CASE

This case arises from Henningson, Durham and Richardson's, a Nebraska corporation, and Ranier Construction Company's, an Arizona corporation, (respondents herein) negligent construction of a defective building for TRIBE, a federally organized tribe of Indians (25 U.S.C. §476), on TRIBE's Gila River Indian Reservation (Reservation). TRIBE in cooperation with the Bureau of Indian Affairs planned a home (Youth Home) on TRIBE's reservation for juveniles referred by the tribal court. The Youth Home was authorized and funded as a federal project. Title to the Youth Home and land on which it is constructed is in the United States in trust for TRIBE.

Respondents designed, constructed, inspected and delivered to TRIBE the Youth Home to fulfill TRIBE's purposes. After respondents were paid in full the building began to crack and break up. The Bureau of Indian Affairs declared the building unsafe for habitation. All resident Indian youth were moved from the home. The structural failure of the building, due to respondents' negligence, rendered useless the tribal land on which it was constructed.

TRIBE filed its complaint in federal district court on June 7, 1976.[2] Jurisdiction of the district court was invoked under 28 U.S.C. §1331, §1332 and §1362. *See*, TRIBE's complaint at page A-23 of the Appendix. The district court dismissed the action for lack of federal question jurisdiction on November 15, 1977. *See*, November 15, 1977 Memorandum and Order of the United States District Court at page A-17 of the Appendix.

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[2] TRIBE initially inquired about filing a Complaint with the Arizona State Registrar of Contractors against respondents. The Registrar of Contractors suggested that the matter was beyond its purview since it involved the United States Government and a federal reservation. *See*, Registrar of Contractor's letter at page A-46 of the Appendix.

On December 12, 1977, the district court denied TRIBE's motion for rehearing and for leave to file the amended complaint tendered with the motion. *See,* December 12, 1977 Order of the United States District Court at page A-22 of the Appendix.

The Court of Appeals for the Ninth Circuit affirmed the district court's order of dismissal but did not discuss TRIBE's motion for leave to amend. *See,* August 29, 1980 Opinion of the Court of Appeals for the Ninth Circuit at page A-2 of the Appendix. On December 4, 1980, the Court of Appeals for the Ninth Circuit denied TRIBE's Petition for Rehearing in Banc. *See,* December 4, 1980 Order of the Court of Appeals for the Ninth Circuit at page A-16 of the Appendix.

TRIBE asks this Court to grant this petition and issue a writ of certiorari to review the decisions of the Court of Appeals for the Ninth Circuit and of the district court.

ARGUMENT

This Court should grant review because:

1. This Court in *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974), expressly declined to decide the question here presented, i.e., whether Congress in enacting 28 U.S.C. §1362 expanded the scope of "arising under" jurisdiction beyond the judicial interpretations of that language under 28 U.S.C. §1331. In *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976), this Court decided that §1362 did more than eliminate the $10,000 jurisdiction limitation of §1331, but did not specify whether the "arising under" language in §1362 had a broader interpretation than the same language in §1331.

2. Indian tribes as well as the United States need to know before December 30, 1982 (28 U.S.C. §2415) the jurisdictional reach of 28 U.S.C. §1362.

3. If the decisions of the lower courts are allowed to stand, firmly rooted historical doctrines and rules established by this Court and in common law will be eroded.

4. The decision of the district court in refusing to allow filing of an amended complaint was in direct conflict with this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962) and *Conley v. Gibson*, 355 U.S. 41 (1957).

I.

TRIBE brought this action under 28 U.S.C. §§1331 and 1362. Section 1331 is the general "federal question" jurisdiction statute. Section 1362 is a jurisdiction statute solely for the benefit of Indian tribes.

The Court of Appeals for the Ninth Circuit, in the instant case, decided that there was no "federal question" jurisdiction under §1331 and that §1362 did not expand the jurisdictional reach of §1331 because §1362 only eliminated the jurisdictional amount requirement of §1331. *Gila River Indian Community v. Henningson, Durham and Richardson, et al.*, 626 F. 2d 708 (9th Cir. 1980). This Court recently expressly reserved deciding the question which is now presented, i.e., whether §1362 is of broader jurisdictional reach than §1331. *Oneida*, 414 U.S. 661 at 679, n. 16. In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 at 472-473 (1976), we believe that this Court went further than in *Oneida* and affirmatively declared that §1362 was a deliberate broadening of the "arising under" requirement of §1331. However, this Court was not precise about the "certain respects" in which the "arising under" requirement of §1362 was said to be broader than §1331. If we correctly construe what this Court indicated in *Moe* then the decisions of the courts below are clearly wrong and conflict with the decision of this Court on the exact point. Because the courts below found themselves perplexed by what we must acknowledge is the absence of categorical

language in *Moe*, they decided that there was no federal question jurisdiction in the case. We submit that the court of appeal's interpretation of §1362 does conflict with the decision of this Court in *Moe*.

Moreover, the question of the jurisdictional reach of §1362 is a question that calls for definitive answer by this Court. It has come up twice in this Court, *Oneida*, 414 U.S. 661 (1974); *Moe*, 425 U.S. 463 (1976), at least twice in the Court of Appeals for the Ninth Circuit with varying results,[3] at least three times in the Court of Appeals for the Tenth Circuit,[4] and at least one time in the Court of Appeals for the Eighth Circuit.[5]

II.

Actions which involve injury to tribal trust property, such as the present one, may be brought by the United States under 25 U.S.C. §175. However, actions for damages brought by the United States which accrued before 1966 must be brought by December 30, 1982. 28 U.S.C. §2415.[6] The United States and all Indian tribes need to know before December 30, 1982, whether tribes may file claims for damages to their trust property in federal courts,

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[3] The decision of the Court of Appeals for the Ninth Circuit in this case, *Gila River Indian Community v. Henningson, Durham and Richardson, et al.*, 626 F.2d 708 (9th Cir. 1980), conflicts with a prior decision of that court in *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973). *Fort Mojave* agreed with the dissenting opinion of Judge Lumbard in *Oneida Indian Nation of New York v. County of Oneida*, 464 F.2d 916 at 924 (2d Cir. 1972). The *Fort Mojave* court cited as in accord: *Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Co.*, 353 F. Supp. 1098 (D. Ariz. 1972) and *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824).

[4] *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975); *Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336 (10th Cir. 1974); *Pueblo of Isleta v. Universal Constructors, Inc.*, 570 F.2d 300 (10th Cir. 1978).

[5] *Standing Rock Sioux Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974).

[6] Additionally the statute of limitation may run daily for actions which accrued after 1966.

or whether the United States Attorney must file all such actions on behalf of Indian tribes. Decision by this Court on the issue of the jurisdictional reach of §1362 is needed in time for the United States or tribes to meet the December 30, 1982, filing deadline.

III.

The lower courts' decisions conflict with principles of Indian law enunciated by this Court. Legal doctrines declared by this Court which recognize and require (1) broad interpretation of statutes enacted for the benefit of Indian tribes, (2) federal protection of tribal trust property interests, and (3) federal protection of Indian sovereignty require that 28 U.S.C. §1362 be construed broadly to extend federal jurisdiction over claims (such as TRIBE's) brought by tribes.

Statutes enacted for the benefit of Indians are to be liberally construed in favor of the Indians. *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); *Squire v. Capoeman*, 351 U.S. 1 (1956), *Holt v. Commissioner*, 364 F.2d 38 (8th Cir. 1966), *cert. denied*, 386 U.S. 931 (1967). The Court of Appeals for the Ninth Circuit recognized this rule of construction but did not apply it. *Gila River Indian Community v. Henningson, Durham and Richardson, et al.*, 626 F.2d 708 at 712 (9th Cir. 1980). Instead, the court interpreted the "arising under" requirement of §1362, a statute enacted solely for the benefit of Indian tribes, to be the same as the "arising under" requirement of §1331, a statute of general jurisdiction.

The court of appeals recognized that included within TRIBE's complaint was a claim that one of TRIBE's reservation buildings "began to break up and come apart" due to the negligence of defendants. *Gila River Indian Community v. Henningson, Durham and Richardson, et al.*, 626 F.2d 708 at 709 (9th Cir. 1980). Nonetheless the court of appeals refused to apply the line of cases which indicate that such actions for interference with tribal possessory interest are cognizable in federal court in actions brought by

Indian tribes. *Gila River Indian Community v. Henningson, Durham and Richardson, et al.*, 626 F.2d 708 (9th Cir. 1980); *compare Oneida*, 414 U.S. 661 (1974) and *Moe*, 425 U.S. 463 (1976).

This Court has been the staunchest protector of the limited sovereignty of domestic dependent Indian nations. *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). The Supreme Court has rebuffed repeated attempts by states and their agencies to limit Indian sovereignty. *See, e.g., Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867); *Williams v. Lee*, 358 U.S. 217 (1958); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *White Mountain Apache Tribe v. Bracker*, ___ U.S. ___, 100 S.Ct. 2578 (1980); *Central Machinery Company v. Arizona Tax Commission*, ___ U.S. ___, 100 S.Ct. 2592 (1980). The recognition of the limited sovereignty of Indian tribes in *Cherokee Nation v. State of Georgia* has evolved into a federal pre-emption analysis. *Bryan v. Itasca County*, 426 U.S. 373 at 376, n. 2 (1976). This pre-emption analysis derives considerable support from "the 'backdrop' of the Indian sovereignty doctrine," *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 at 475 (1976). Crucial to Indian sovereignty and federal pre-emption of dealings with Indian tribes are independence from state laws when tribes are carrying out tribal objectives and the availability of a forum which is not an organ of state governments. This matter becomes particularly significant as tribes develop their economies and become self-sufficient with self-determining forms of government. This

Court has reaffirmed that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan,* 411 U.S. 164 at 168 (1973).

The court of appeals refused to apply this important policy of federal law and thus deprived TRIBE a federal forum.

To eliminate present uncertainty and confusion, this Court should grant TRIBE'S petition for a writ of certiorari to decide the jurisdictional reach of 28 U.S.C. §1362.

IV.

The district court denied TRIBE's motion for leave to file an amended complaint, a copy of which was tendered with the motion. The court of appeals recognized that TRIBE had appealed on this issue *(Gila River Indian Community v. Henningson, Durham and Richardson, et al.,* 626 F.2d 708 at 710 (9th Cir. 1980)) but did not decide or even discuss the issue. The decision of the district court was contrary to the decisions of this Court in *Foman v. Davis,* 371 U.S. 178 (1962) and *Conley v. Gibson,* 355 U.S. 41 (1957).

In the exercise of this Court's power of supervision TRIBE's petition for a writ of certoriari should be granted in order to achieve conformity with prior decisions of this Court.

CONCLUSION

For the foregoing reasons, TRIBE's petitior for a writ of certiorari should be granted to eliminate present uncertainty and confusion as to the jurisdictional reach of 28 U.S.C. §1362 and to require the district court to allow TRIBE to file an amended complaint in conformity with this Court's prior decisions.

Respectfully submitted,

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APPENDIX

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6. Amended Complaint (tendered). A-40

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GILA RIVER INDIAN COMMUNITY,
Plaintiff-Appellant,

v.

HENNINGSON, DURHAM & RICHARDSON, a Nebraska corporation, and RANIER CONSTRUCTION COMPANY, INC., an Arizona corporation,
Defendants-Appellees.

No. 78-1483

D.C. No. 76-390 PHX WPC

Filed Aug. 29, 1980

OPINION

Appeal from the United States District Court
for the District of Arizona
Honorable William P. Copple, Presiding
Argued & Submitted May 15, 1980

Before: HUG and ALARCON, Circuit Judges, and BLUMENFELD*, District Judge.[1]

HUG, Circuit Judge:

This is an action brought by the Gila River Indian Community against an architectural firm and a building contractor for damages for the negligent design and construction of a Youth Center on the Gila River Indian Reservation. The district court dismissed for lack of jurisdiction. Appellant contends that jurisdiction exists under

[1] *Honorable M. Joseph Blumenfeld, Senior United States District Judge for the District of Connecticut, sitting by designation.

28 U.S.C. §§ 1331 and 1362.[1] The major issue on this appeal is the extent of the jurisdiction afforded by section 1362.

In 1966, Congress enacted 28 U.S.C. § 1362 which provides for district court jurisdiction over suits brought by Indian tribes or bands:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

In this appeal we are faced with the question of whether Congress intended federal jurisdiction in such suits to be broader than that of the jurisdiction of the district courts in suits brought under the general federal question jurisdiction statute, 28 U.S.C. § 1331,[2] and if so, whether such jurisdiction extends to this type of case. Appellant contends that the district court erred in concluding that jurisdiction under section 1362 does not extend to the facts of the present case. We affirm.

I

The appellant, the Gila River Indian Community ("Tribe"), is composed of the confederated Pima and Maricopa tribes of Indians. The Tribe was organized pursuant to 25 U.S.C. § 476. The Secretary of the Interior approved the

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[1] Jurisdiction was also asserted in the trial court under section 1332, which provides for jurisdiction in cases of diversity of citizenship. The district court determined that the prerequisites for obtaining jurisdiction by virtue of diversity of citizenship had not been met. The Tribe has not appealed this portion of the ruling, and thus that issue is not before us.

[2] In pertinent part, 28 U.S.C. § 1331 provides:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . . .

constitution and bylaws of the Tribe on May 14, 1936.[3] Fee title to the land on the Gila River Indian Reservation ("Reservation") is held by the United States in trust for the Tribe. The present action was commenced at the direction of the Gila River Indian Community Council, the Tribe's governing body.

The complaint alleges that the appellees, Henningson, Durham, & Richardson, Inc. ("Henningson"), an architectural and engineering firm, and Ranier Construction Company, Inc. ("Ranier"), a contracting firm, improperly designed and constructed a Youth Center located on the Reservation at Sacaton, Arizona. The Youth Center was completed in 1969. The complaint alleges that in 1973 the Youth Center began to break up and come apart to the point that the Tribe was forced to abandon the building. The alleged causes of the defects of the Youth Center are: the negligence of Henningson in its faulty design of the building, its failure to specify the proper manner of, and materials to be used in, the construction, and its inadequate supervision and inspection during construction; and the negligence of Ranier in constructing the building.

The district court dismissed without prejudice the action against both Henningson and Ranier, holding that the complaint pleaded a cause of action for breach of contract arising solely under state law. It was the conclusion of the district court that jurisdiction could not exist under section 1331, and that Congress did not intend to extend the jurisdictional reach of section 1362 to the facts of the present case.

The Tribe filed a motion for rehearing and a motion for leave to file an amended complaint. The district court denied both these motions, stating that the allegations contained in the amended complaint raised no new relevant issues nor did they cure the jurisdictional defects of the

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[3] Subsequent amendments to the Constitution and bylaws were approved by the Secretary of the Interior on March 17, 1960, and January 28, 1974.

original complaint. The Tribe appeals from the original order of dismissal and the order denying the motions for reconsideration and to amend.[4]

The Tribe contends that the language "arises under the Constitution, laws, or treaties of the United States" in section 1362 extends to all suits in which the United States could have represented an Indian tribe under 25 U.S.C. § 175.[5] In the alternative, the Tribe contends that the present action should be governed by federal common law, thus fulfilling the "arising under" requirement.

II

Congress used identical "arising under" language in sections 1331 and 1362, the difference being that section 1362 does not contain the $10,000 jurisdictional amount requirement. Appellees argue that Congress intended the jurisdictional amount requirement to be the only difference between the two statutes, and that section 1362 still requires a case to come within the "arising under" doctrine.

The plain meaning of the language used by Congress in section 1362 would tend to support appellees' position. This court has recently examined overreliance on the "plain meaning" rule, however. *See Church of Scientology v.*

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[4] The district court's original order dismissed both the complaint and the action without prejudice. The order denying the Tribe's subsequent motions for reconsideration and for leave to amend did not indicate that further amendments would be disallowed. However, the two orders make clear that the district court determined that the Tribe would be unable to amend its complaint so as to properly invoke subject matter jurisdiction; thus, they are final and appealable orders. *See Blevins v. Ford*, 572 F.2d 1336, 1338 (9th Cir. 1978).

[5] 25 U.S.C. § 175 provides:

> In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.

This court has held that this section is discretionary, not mandatory. *See United States v. Gila River Pima-Maricopa Indian Community*, 391 F.2d 53, 56 (9th Cir. 1968); *Siniscal v. United States*, 208 F.2d 406, 410 (9th Cir. 1953).

United States Department of Justice, 612 F.2d 417, 420-22 (9th Cir. 1979). Resort to legislative history is not inappropriate where application of the "plain meaning" rule would lead to an unreasonable result "plainly at variance with the policy of the legislation as a whole." *Id.* at 422, *quoting United States v. American Trucking Associations*, 310 U.S. 543 (1940), *quoting Ozawa v. United States*, 260 U.S. 178, 194 (1922). In the present case resort to the legislative history is appropriate because of the strong federal interest in the protection of Indians, *see Moses v. Kinnear*, 490 F.2d 21, 25 (9th Cir. 1974), and because of what may be interpreted as indications in case law of this circuit and the Supreme Court that section 1362 may have a broader jurisdictional reach than section 1331.

There is language in the legislative history that elimination of the $10,000 amount requirement was intended to be the only difference between the two sections.

> The purpose of the proposed legislation is to provide that the district courts are to have original jurisdiction of all civil actions brought by Indian tribes or bands wherein the matter in controversy *arises under the Constitution, laws, or treaties of the United States. These civil actions would therefore be permitted without regard to the $10,000 jurisdictional amount* provided in section 1331(a) of title 28, when brought by an Indian tribe or band under the authority of the new section added by the bill.
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> . . . .
>
> By adding a new section 1362 to chapter 85 of title 28 of the United States Code, the bill would add language to that title making it possible for an Indian tribe or band having a governing body recognized by the Secretary of the Interior to bring actions in a district court *where the matter in controversy arises under the Constitution, laws, or treaties of the United States.* In providing for original jurisdiction of all civil actions of this type, *the bill has the effect of removing the $10,000 jurisdictional requirement* which presently applies as to such actions by reason of the

provisions of section 1331 of the same chapter of title 28. The district courts now have jurisdiction over *cases presenting Federal questions* brought by the tribes when the amount in dispute exceeds $10,000. *Enactment of this bill would merely authorize the additional jurisdiction of the court over those cases where the tribes are not able to establish that the amount in controversy exceeds that amount.* In its report to the Senate Committee, the Department of the Interior specifically pointed out that the *issues involved in cases involving tribal lands that either are held in trust or were so held by the United States or are held by the tribe subject to restriction against alienation imposed by the United States are Federal issues.* The Department therefore observed that particularly as to this class of cases it is appropriate that the actions be brought in a U.S. district court. In its statement to the Senate committee, that Department referred to the unique governmental status of Indian tribes and the unique relationship which exists between them and the Federal Government. This is a relationship often affected by treaties and the Department of the Interior indicated that a tribe's desire to have a Federal forum for matters based upon Federal questions is justified.

. . . .

In his statement before the Senate committee, the representative of the Department of Interior stated that it was the Department's view that the creation of the jurisdiction contemplated by the bill will not add appreciably to the burdens of the Federal courts. As has been noted, these courts now entertain cases brought by the Federal Government to vindicate tribal rights without regard to the amount in controversy. Further, they now entertain cases *presenting Federal questions* brought by the tribes when the amount in dispute exceeds $10,000. This bill would therefore authorize the addition of only those cases, which the Justice Department stated would probably not be large in number, where the tribes have not been able to show that the amount in controversy exceeds $10,000,

> and the Government for some reason does not want to prosecute the case in behalf of the tribe. The Judicial Conference in commenting on this type of case has stated that the jurisdiction contemplated by the bill would present no difficulty of judicial administration.

H.R. Rep. No. 2040, 89th Cong., 2nd Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3145-47 (emphasis added). The Tribe points to language in the legislative history that the Tribe claims indicates that suits may be brought under section 1362 whenever the United States attorney declines to take action under 25 U.S.C. § 175:

> The committee feels that there is another factor which is relevant in this situation and serves to emphasize the justification for enactment of this bill. *The United States as trustee can initiate litigation involving issues identical to those which would be presented in cases brought under the new section. The enactment of this bill would provide for U.S. district court jurisdiction in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action.* As is observed in the Department of the Interior report, the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. There is a large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian tribes. The Federal forum is therefore appropriate for litigation involving such issues.

Id. (emphasis added). There is no doubt, as the legislative report states, that the United States as trustee can initiate litigation identical to cases brought under section 1362. The Tribe's illation that the obverse is true, that an Indian tribe may bring any action not brought by the United States, does not necessarily follow, however. The key phrase is "cases brought under the new section." The earlier lan-

guage of the report indicates that the jurisdiction in the new section still extends only to cases arising under the Constitution, laws, or treaties of the United States and that only the $10,000 requirement was being removed.

Cases interpreting section 1362 have been less than clear as to how far its jurisdictional reach extends. In reviewing these cases we bear in mind that statutes passed for the benefit of Indian tribes, such as section 1362, are to be liberally construed, with doubtful expressions being resolved in the Indians' favor. *See McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 174 (1973); *Navajo Tribal Utility Authority v. Arizona Department of Revenue,* 608 F.2d 1228, 1233 (9th Cir. 1979).

The Supreme Court has on two recent occasions considered the jurisdiction of the federal courts over cases brought by Indian tribes. In *Oneida Indian Nation v. County of Oneida,* 464 F.2d 916 (2nd Cir. 1972) ("Oneida I"), the Second Circuit concluded that a claim by an Indian tribe that the defendants were in unlawful possession of Indian lands was an action in ejectment which presented no federal question under section 1331. The Second Circuit also rejected the argument urged in the present case, stating that "the sole purpose of § 1362 was to remove any requirement of a jurisdictional amount," despite the fact the suit could not have been brought in the state courts. *Id.* at 919 n.4. A vigorous dissent was written by Judge Lumbard, who believed that the legislative history of section 1362 showed that Congress intended the tribes to have an available forum when the Government declined to represent them. *Id.* at 924. In light of the broader interpretation he would have given section 1362, Judge Lumbard would have afforded the Indians the right to have the dispute determined in federal court.

The Supreme Court reversed the Second Circuit on the ground that the complaint stated a cause of action under section 1331, as well as under section 1362. *See Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974)

("Oneida II"). In doing so the Court specifically declined to decide whether Congress intended to broaden the "arising under" language in enacting section 1362, in addition to eliminating the jurisdictional amount requirement. *Id.* at 682 n.16. The Court stated that tribal rights to Indian lands are an exclusive province of federal law and the right to possession was based on assertion of such federal law. *Id.* at 666-67. The Court held that federal law protects the Indians' possessory right to tribal lands wholly apart from state law principles which separately protect the right of possession, and thus the complaint arose under federal law within the meaning of both sections. *Id.* at 677.

The second case in which the interpretation of section 1362 was addressed by the Court was *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976). In *Moe* the Court was faced with the question whether Indians claiming immunity from state taxes could seek an injunction against the state in light of 28 U.S.C. § 1341, which prohibits the district courts from enjoining state tax collection where there is a speedy remedy available in the state courts, unless the plaintiff is the United States. The Court first considered the interpretation of section 1362:

> Looking to the legislative history of § 1362 for whatever light it may shed on the question, we find an indication of a congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought. Section 1362 is characterized by the reporting House Judiciary Committee as providing "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." While this is hardly an unequivocal statement of intent to allow such litigation to proceed irrespective of other explicit jurisdictional limitations, such as § 1341, it would appear that Congress contemplated that a tribe's access to federal court to

> *litigate a matter arising "under the Constitution, laws, or treaties"* would be at least in some respects as broad as that of the United States suing as the tribe's trustee.

Id. at 472-73 (emphasis added) (footnote omitted). This excerpt specifically refers to the "arising under" requirement with respect to a tribe's access to federal court under section 1362. The Court went on to conclude that because the United States was not barred from seeking an injunction by section 1341, and the United States could have sued in behalf of the Indians,[6] the Indians were likewise free to proceed:

> We think that the legislative history of § 1362, though by no means dispositive, suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf.

Id. at 474. This statement, while removing jurisdictional impediments such as section 1341, does not go so far as to remove the "arising under" requirement of section 1362.

This court, in an action to quiet title to Indian lands, found it doubtful that the requirements of section 1331 could be met, whether the action was styled as one to quiet title or one of ejectment. *See Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir. 1973). We did, in that opinion, agree with the dissenting opinion of Judge Lumbard in *Oneida I* that "Congress intended by § 1362 to authorize an Indian tribe to bring suit in federal court *to protect its federally derived property rights* in those situations where the United States declines to act." *Id.* at 1018

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[6] The Court did not rely on 25 U.S.C. § 175 as authority for the ability of the United States to bring the action. Instead the court relied on *Heckman v. United States*, 224 U.S. 413 (1912) and *United States v. Rickert*, 188 U.S. 432 (1903), which established the interest of the United States in "securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection." *Heckman*, 224 U.S. at 441.

(emphasis added). The decision was issued before the Supreme Court's decision in *Oneida II*, which would have allowed jurisdiction under section 1331 in *Fort Mojave*, thus rendering questionable any reliance on this court's language in *Fort Mojave* that extended jurisdiction under section 1362 beyond that of section 1331. Our concern that a federal forum should be provided for disputes involving Indian lands was the determinative factor of our interpretation of section 1362 in *Fort Mojave*. This concern was alleviated by the decision in *Oneida II*, which held that jurisdiction existed under both section 1331 and section 1362.

In two cases decided by the Tenth Circuit after *Oneida II*, that court has not had to reach the issue whether section 1362 extends beyond section 1331, because the court found both cases controlled by *Oneida II*. In *Mescalero Apache Tribe v. Burgett Floral Co.*, 503 F.2d 336 (10th Cir. 1974), the court found a claim of trespass and destruction of trees on the reservation raised the issue of protection of the tribe's possessory rights. Likewise, in *Pueblo of Isleta v. Universal Constructors, Inc.*, 570 F.2d 300 (10th Cir. 1978), the court held a claim of damages to houses on the reservation from blasting activities carried on outside the reservation involved the possessory rights of the tribal lands.

A district court decision relied upon heavily by the Tribe concerned a trespass claim by an Indian tribe against persons who had allegedly been issued permits by the United States to enter on the reservation. *See Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Co.*, 353 F.Supp. 1098 (D. Ariz. 1972). *Salt River* is the only case where a court has directly held that Congress intended to assure the tribe of the same judicial determination whenever the Government chooses not to sue under 25 U.S.C. § 175, and that under section 1362 any case which might have been brought by the United States satisfies the "arising

under" requirement if brought by a tribe. Again, however, *Salt River* represents a case which would come within section 1331 after *Oneida II*, and its value as precedent is therefore weakened.

The common thread running through these cases which would extend the jurisdictional reach of section 1362 is that they all involved possessory rights of the tribes to tribal lands. That such rights were granted and governed by federal treaties and laws was the basis for the Court's holding in *Oneida II*. We do not find the implication of such rights in the present case, nor do we find congressional intent to extend section 1362 to the facts of the present case.

There is nothing is the present case which suggests that the action is anything more than a simple breach of contract case. The dispute concerns adequacy of performance in planning and constructing the Youth Center. The Tribe's possessory right to the land or any rights granted under any federal treaty or statute are not at issue. The Tribe does not seek recovery for damages to Indian land, but rather seeks recovery of damages for failure to perform a construction contract.

We find support for our decision in *Mescalero Apache Tribe v. Martinez*, 519 F.2d 479 (10th Cir. 1975). That case, decided after *Oneida II*, involved a breach of contract action for failure to construct trailer campsites on a reservation. The court held that jurisdiction under section 1362 does not extend to such an action. In light of *Oneida II* this view is not inconsistent with *Fort Mojave* which found that the federal jurisdiction exists for actions involving property rights to Indian lands.

We find inadequate support for the contention that Congress intended to provide jurisdiction for a tribe to bring an action under section 1362 in every instance where the United States can bring an action on behalf of the Tribe under 28 U.S.C. § 175. Congress used "arising under" language in section 1362 that is identical to that contained in section 1331. Congress could easily have provided that In-

dian tribes could bring under section 1362 any action which the United States could bring under section 175, but Congress did not do so.

III

The Tribe argues that jurisdiction should exist under sections 1331 and 1362 because actions involving Indian contracts should be controlled by federal common law. This argument is based upon 25 U.S.C. §§ 81-85, which deal with "Contracts with Indians." The Tribe contends that these sections demonstrate the intention of the federal government to foster and encourage federal policies and federal protection with respect to Indian contracts, which should be governed by federal common law.[7]

It is true that the "arising under" requirement of section 1331 may be met by "claims founded upon federal common law as well as those of a statutory origin." *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). However, we can discern no reason in the present case to extend the reach of the federal common law to cover all contracts entered into by Indian tribes. Otherwise the federal courts might become a small claims court for all such disputes.

The rights of the Tribe in its relationship with the federal government is not at issue in this case. *Contrast White v. Matthews*, 420 F.Supp. 882, 887-88 (D.S. Dak., 1976) (duty of federal officials to provide mental health care to Indians on a reservation). The substance of this controversy centers upon the contract and its construction. *See Littell v. Nakai*, 344 F.2d 486-488 (9th Cir. 1965), *cert. denied*, 382

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[7] Section 81 requires approval of the Secretary of the Interior of certain contracts. Section 82 provides procedures for payment under such contracts, and section 84 sets restrictions on assignment of such contracts. The Tribe does not contend that its dispute with the appellees is governed by any of these sections.

U.S. 986 (1966). *Mescalero Apache Tribe v. Martinez*, 519 F.2d at 481. We are thus not concerned with the strong interest in tribal rights to Indian lands reflected in *Moe* and *Oneida II*.

We see no reason why commercial agreements between tribes and private citizens cannot be adequately protected by well-developed state contract laws. Nor has the tribe pointed out why national uniformity of rules governing these transactions would be desirable. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979); *Pankow Construction Co. v. Advance Mortgage Corp.*, 618 F.2d 611 (9th Cir. 1980); *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 554 F.2d 381, 390-91 (10th Cir.), *cert. denied*, 434 U.S. 920 (1977). Adoption of state law in such cases does not present a conflict with the federal policy or interest in protection of Indian tribes. Nor has any other court perceived the need for federal common law rules governing contract disputes between Indian tribes and non-Indians. The absence of the United States as a party to the litigation is also a factor in determining the need for a federal common law rule. *See Pankow v. Construction Co. v. Advance Mortagage Corp.*, 618 F.2d at 614 n.7. *Cf. Ashland Oil, Inc. v. Phillips Petroleum Co.*, 554 F.2d at 390 (fact that Government entered litigation casts action in a different light). In light of these considerations, we decline to embark upon the course the Tribe suggests.[8]

IV

We decline to extend the reach of section 1362 or the federal common law to the facts of the present case. The judgment of the district court is AFFIRMED.

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[8] We also reject the Tribe's attempt to style the action as a tort action for damage to the Tribe's land. It is clear that the Tribe's claim rests upon the failure to perform contractual obligations. The damages sought were not for trespass on the land, for restoration of the land to its original state or for irreparable injury to the land, but rather for failure to perform under the design and construction contracts.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GILA RIVER INDIAN COMMUNITY, *Plaintiff-Appellant,* v. HENNINGSON, DURHAM & RICHARDSON, a Nebraska corporation, and RANIER CONSTRUCTION COMPANY, INC., an Arizona corporation, *Defendants-Appellees.*	No. 78-1483 D.C. No. 76-390 PHX WPC Filed Dec. 4, 1980 **ORDER**

Appeal from the United States District Court
for the District of Arizona
Honorable William P. Copple, Presiding
Date of Submission: May 15, 1980

Before: HUG and ALARCON, Circuit Judges, and BLUMENFELD*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Alarcon have voted to reject the suggestion for rehearing en banc and Judge Blumenfeld has recommended rejection of the suggestion for a rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable M. Joseph Blumenfeld, Senior United States District Judge for the District of Connecticut, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY, *Plaintiff,* vs. HENNINGSON, DURHAM & RICHARDSON, a Nebraska corporation, and RANIER CONSTRUCTION COMPANY, INC., an Arizona corporation, *Defendants.*	No. Civ. 76-390 Phx. WPC **MEMORANDUM AND ORDER** Filed Nov. 15, 1977

This action involves the question whether a federal court can assert subject matter jurisdiction over a contract dispute between an Indian tribe and non-Indians. In 1967, Henningson, Durham & Richardson, a Nebraska corporation, agreed to prepare construction drawings and specifications for a youth center for the Gila River Indian Community. The youth center was built by Ranier Construction Company, an Arizona corporation, and completed in 1969. By 1973 defects were discovered in the youth center which rendered the building unsafe. Plaintiff Gila River Indian Community alleges the defects are due to negligent design and construction. Plaintiff began this action, asserting jurisdiction under 28 U.S.C. §§ 1331, 1332, and 1362. Defendant Henningson moves to dismiss for lack of subject-matter jurisdiction.

The Court does not have subject-matter jurisdiction by virtue of diversity of citizenship. Plaintiff is the confederated Pima and Maricopa tribes of Indians. An Indian tribe cannot sue pursuant to 28 U.S.C. § 1332. "An Indian Tribe is not a citizen within the meaning of that clause. If it were incorporated under the laws of the United States it could not sue or be sued under the diversity of citizenship clause

unless there were an act of Congress providing that a tribe should be considered as possessing a state citizenship for jurisdictional purposes." F. Cohen, Handbook on Indian Law 372 (N. Mex. ed. 1942).

The Court also lacks federal-question jurisdiction over this action. 28 U.S.C. § 1331 grants jurisdiction only over claims "arising under" federal law. *See* C. Wright, A. Miller & E. Cooper, Fed. Prac. and Pro.: Jurisdiction § 3562. Moreover, the federal question must appear on the face of the well-pleaded complaint. *Id.* § 3566. Plaintiff points out constitutional and statutory law which limits and controls the operations of an Indian tribe. For example, 25 U.S.C. § 81 regulates the manner in which contracts with Indian tribes can be made. Therefore, plaintiff concludes this action "arises under" federal law. In *Littel v. Nakai,* 344 F.2d 486 (9th Cir. 1965), *cert. denied,* 382 U.S. 986 (1966), the Court rejected the argument that all contracts made pursuant to section 81 arise under federal law. "From the pleading it is apparent that the real substance of the controversy centers upon the contract and its construction rather than the statutory basis for the contract.... 'The federal nature of the right to be established is decisive—not the source of the authority to establish it.' " *Id.* at 488. On its face, plaintiff's complaint pleads a cause of action for breach of contract arising solely under state law. Subject-matter jurisdiction cannot rest on section 1331.

Plaintiff primarily relies upon 28 U.S.C. § 1362 to establish jurisdiction. Section 1362 states:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy *arises under* the Constitution, laws, or treaties of the United States.

Id. (emphasis added); *see* 1966 U.S. Code Cong. and Admin. News 3145 (House Rep. No. 2040). The legislative history of section 1362 indicates a Congressional purpose to eliminate the $10,000 amount in controversy requirement of section 1331 for actions brought by Indian tribes. "This bill would therefore authorize the addition of only those cases ... where the tribes have not been able to show that the amount in controversy exceeds $10,000, and the Government for some reason does not want to prosecute the case on behalf of the tribe." *Id.* at 3147.

In *Oneida Indian Nation of N.Y. State v. County of Oneida*, 494 F.2d 916 (2d Cir. 1972), *rev'd on other grounds* 414 U.S. 661 (1974), Judge Lumbard, dissenting, stated that the well-pleaded complaint rule of section 1331 did not apply to action under section 1362. *Id.* at 924-25. Judge Lumbard reasoned that Congress intended that section 1362 grant broader jurisdictional authority than section 1331. The Lumbard interpretation is consistent with the "arising under" language of section 1362. By negating the well-pleaded complaint rule, a court merely allows the pertinent federal question to arise in any of the pleadings. This broad interpretation of section 1362 has been followed in this circuit. *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973)

Plaintiff argues that this Court should construe section 1362 even further. In *Salt River Pima-Maricopa Indian Community v. Arizona S. & R. Co.*, 353 F. Supp. 1098 (D. Ariz. 1972) (Murray, J.), the Court stated "the effect of the [section 1362] bill would be to provide the means whereby the tribes are assured of the same judicial determination whenever the government chooses not to exercise its discretion and declines to bring the action.... Under § 1362 any case which might have been brought by the United States is deemed to be one arising under the Constitution, laws or treaties of the United States if it is brought on behalf of an Indian tribe by their attorneys." *Id.* at 1100. This Court declines to follow *Salt River*. The United States can sue on

behalf of Indian tribes pursuant to 25 U.S.C. § 175. The federal district courts have jurisdiction over these suits under 28 U.S.C. § 1345, which grants jurisdiction over suits brought by the United States. If Congress intended the district courts to assert jurisdiction over any suit brought by an Indian tribe, then Congress could plainly state so. To conclude that section 1362 grants jurisdiction whenever the United States may sue on behalf of the tribe is to read "arising under" out of section 1362. *Mescalero Apache Tribe v. Mustang*, 519 F.2d 479 (10th Cir. 1975).

Plaintiff argues that *Salt River* is supported by dictum in *Moe v. Confederated Salish and Kootenai Tribes*, ___ U.S. ___, 96 S.Ct. 1634 (1976). In *Moe*, the Court stated that "the legislative history of § 1362, though by no means dispositive, suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued on their behalf." 96 S.Ct. at 1641-42. However, plaintiff overlooks that the Indian tribe in *Moe* sued upon a right squarely based upon federal law.

> We conclude that the United States could have brought this action in federal court . . . based upon the interest of the United States in protecting reservation Indians from state taxation and the fact that the asserted tax immunity is based solely upon federal law.

Confederated Salish & Kootenai Tribes, Mont. v. Moe, 392 F.Supp. 1297 (D.Mont. 1975), *aff'd* ___ U.S. ___, 96 S.Ct. 1634. Construing all the pleadings, the Court concludes that plaintiff's claim does not arise under federal law within the meaning of section 1362.

The motion to dismiss is brought only by defendant Henningson. On its own motion, the Court concludes that subject-matter jurisdiction is also lacking as to defendant

Ranier Construction Company for the same reasons stated above. Therefore,

IT IS ORDERED:

1. The complaint and action are dismissed without prejudice.

2. The pretrial conference now scheduled for March 20, 1978, is vacated, and the order for compliance under Rule 42 is quashed.

DATED November 15, 1977.

/s/ WM. P. COPPLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY,
Plaintiff,
vs.
HENNINGSON, DURHAM & RICHARDSON, et al.,
Defendant.

No. Civ. 76-390
Phx WPC
Filed Dec. 12, 1977

IT IS ORDERED:

1. Plaintiff's motion for rehearing is denied.

2. Plaintiff's motion for leave to file an amended complaint is denied. The proposed amended complaint raises no relevant issues not previously raised by the brief herein and the allegations therein do not cure the jurisdictional defects present in the original complaint.

/s/ WM. P. COPPLE
Wm. P. Copple
United States District Judge

Mailed this 12th day of December, 1977, to:
Jennings Strouss et al
Thomas W. Murphy
Cox and Cox

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY,
Plaintiff,
v
HENNINGSON, DURHAM & RICHARDSON, a Nebraska Corporation, and RANIER CONSTRUCTION COMPANY, INC. an Arizona Corporation,
Defendants.

No. CIV 76-390 PHX WPC
COMPLAINT
Filed June 7, 1976

For its claim against defendant, plaintiff alleges:

I

This court has jurisdiction under 28 U.S.C., §1331, 1332 and §1362.

II

Plaintiff Gila River Indian Community is now and has been since prior to 1848, the confederated Pima and Maricopa tribes of Indians. Plaintiff is organized under the Constitution and laws of the United States pursuant to 25 U.S.C., §476, with constitution and bylaws approved by the Secretary of the Interior May 14, 1936, and amendments thereto approved by the Secretary of the Interior March 17, 1960, and January 28, 1974.

III

Plaintiff brings this action pursuant to direction of the Gila River Indian Community Council, plaintiff's governing body recognized by the Secretary of the Interior and under authority of Article XV of its Constitution and bylaws.

IV

Defendants HENNINGSON, DURHAM & RICHARDSON, INC., (hereinafter called HENNINGSON), a Nebraska Corporation, heretofore qualified in the State of Arizona as a foreign corporation, and was licensed on or about September 20, 1958 by the Arizona State Board of Technical Registration as architects and engineers.

V

Defendant RANIER CONSTRUCTION CO., INC. (hereinafter called RANIER), an Arizona Corporation qualified to do business in the State of Arizona, was licensed by the Arizona State Registrar of Contractors on or about June 1964.

VI

During all times material to this claim HENNINGSON has been in the business and held itself out as a qualified and competent firm of architects and engineers for the purposes of planning, designing of all types and sizes of buildings and for the supervision of the construction of the same.

VII

During all times material to this claim RANIER has been in the business and held itself out as a qualified and competent contractor for the construction of all types and sizes of buildings and for the supervision of the construction of the same.

VIII

On or about July 12, 1967, plaintiff entered into an Owner-Architect Agreement with HENNINGSON a copy of which agreement is attached hereto and incorporated by reference. Said agreement provided among other things, that HENNINGSON was to render professional services in preparing construction drawings and specifications for a

Youth Center to be located on the Gila River Indian Reservation, at Sacaton, Arizona. HENNINGSON completed and submitted specifications dated September 26, 1968, together with construction drawings.

IX

The U.S. Department Commerce, Economic Development Administration, authorized the construction of the Youth Center and designated said project as EDA No. 08-1-00447.

X

In compliance with EDA regulations, the construction of said Youth Center was put out to public bid. On or about March 13, 1969, RANIER was the low bidder. A construction contract was issued to RANIER on or about May 6, 1969, in the amount of $60,708.00, a copy of which is attached hereto and incorporated by reference.

XI

Defendants, through their agents, servants and employes had actual knowledge of the specific uses, purposes and requirements for which said Youth Center was to be planned and constructed. Plaintiff relied upon defendants' skill and judgment that said building would be fit for the use and purpose intended. Defendants impliedly warranted the fitness of said building for said use and purpose.

XII

On or about November 11, 1969, plaintiff was given occupancy to the Youth Center constructed by RANIER and inspected by HENNINGSON.

XIII

Defendants HENNINGSON and RANIER were paid in full for services in accordance with the respective contracts.

XIV

Plaintiff used the building and premises in the manner in which it was intended to be used and until the latter part of July 1973, was unaware of any defects in the building which would make it unsafe for its intended use.

XV

On or about July 19, 1973, plaintiff's agents and employes first noticed that the Youth Center was beginning to break up and come apart.

XVI

Plaintiff notified defendants of the problem. On or about August 1973, defendants visited and inspected said building. Defendants advised plaintiff that there was nothing defendants could do to stop the breaking up of or to stabilize the building or to make it tenantable.

XVII

Plaintiff requested the Area Director of the Phoenix Area Office of the Bureau of Indian Affairs, United States Department of the Interior to inspect or have said building inspected. In August 1973, upon the advice of the Phoenix Area Office, United States Department of the Interior, plaintiff abandoned said building and salvaged all useable equipment and materials to mitigate plaintiff's damage.

XVIII

The failure of said Youth Center was proximately caused by the negligence of HENNINGSON and its failure to properly design or specify the manner and materials to be used in the construction of said building, or in supervising and inspecting during the course of construction of said building and of the defendant RANIER in the construction of said building. Defendants knew or should have known of the defectiveness and probable failure of said Youth Building.

XIX

As a result of defendants negligence and the proximated caused structural failure of said building, plaintiff has suffered damage in excess of $85,000.00, the cost to remove and replace said building.

WHEREFORE, plaintiff prays judgment against defendants in the sum of $85,000.00 together with interest and court costs.

COX AND COX
By /s/ L. J. Cox, Jr.
Attorneys for Plaintiff

OWNER-ARCHITECT AGREEMENT

In accordance with Resolution #342-67 adopted by the Gila River Indian Community in special meeting on the 12th day of July 1967 at Sacaton, Arizona THIS AGREEMENT is made as of the 12th day of July in the year Nineteen Hundred and Sixty-Seven by and between the Gila River Indian Community hereinafter called the Owner, and HENNINGSON, DURHAM & RICHARDSON, INC. hereinafter the Architect-Engineer.

WITNESSETH, that whereas the Owner intends to erect TWO (2) NEIGHBORHOOD FACILITY BUILDINGS and ONE (1) YOUTH CENTER. to be located in each of the following three communities on the Gila River Indian Reservation: One (1) Youth Center to be located at Sacaton and One (1) each Neighborhood Facility to be located at Santa Cruz and Pachule respectively, hereinafter called the Project.

NOW, THEREFORE, the Owner and the Architect-Engineer for the consideration hereinafter named, agree as follows:

The Architect-Engineer agrees to perform, for the above named Projects professional services as hereinafter set forth.

1. *Basic Services:*

   Phase I-Design, Plans and Specifications

   (a) The Architect-Engineer shall consult with Owner to ascertain the requirements of Project and shall confirm such requirements to Owner. Among items to be discussed shall be the scope of the project purpose, general plan and design, location, general type of construction, the probable time required to build and the estimated cost. Architect-Engineer shall prepare design documents subject to approval by Owner and EDA.

(b) Architect-Engineer shall prepare from the approved design documents, working drawings and specifications setting forth in detail and prescribing the work to be done, and the materials, workmanship, mechanical, electrical service-connected equipment, and site work, and the necessary bidding information, General Conditions of the Contract, and Supplementary General Conditions of the Contract, and shall assist in the drafting of proposal and contract forms. Included shall be the co-ordination of drawings and specifications for trades to avoid conflict and to facilitate proper installations.

(c) Architect-Engineer shall keep Owner informed of any adjustments to previous statements of the probable Project construction cost indicated by changes in scope, requirements, or market conditions.

(d) Architect-Engineer shall be responsible for filing the required documents to secure approval of governmental authorities having jurisdiction over this Project.

(e) Architect-Engineer shall furnish Owner ten sets of contract documents, plans and specifications. In the event additional copies are required, they will be furnished at the cost of reproduction.

Phase II-Construction

(a) Architect-Engineer shall assist Owner in obtaining proposals from Contractors and in awarding and preparing construction contracts. To the extent provided by the Contract between Owner and Contractor, Architect-Engineer shall make decisions on all claims of Owner and Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the contract documents. Owner reserves the right to approve all Contractors and Sub-Contractors on Project.

(b) Architect-Engineer shall keep the Owner informed of the progress of construction and issue a monthly progress report of the various phases of construction after agreeing to a construction schedule with the Contractor; check and approve schedules and shop drawings for compliance with design; prepare change orders; examine Contractor's applications for payment and provide general administration of the construction contracts; including periodic inspections at the site; determine date of substantial completion; make final inspection of Project; assemble written guarantees required of the contractors; and issue the final certificate for payment.

(c) Architect-Engineer shall endeavor to guard Owner against defects and deficiencies in work of contractors, but does not guarantee contractor's performance under their contracts.

Phase III-Other Duties of Architect-Engineer under Basic Services.

(a) Architect-Engineer shall call for and supervise all surveys, test borings, pits, sub-surface explorations or other investigations required to determine foundation conditions of the structure, inspections and tests of materials entering into the construction of the structure, and receive reports of all such tests. The cost of all such surveys, borings, pits, explorations, investigations, and tests shall be borne by Owner. If furnished by the Architect-Engineer, these will be compensated for according to the schedule under 5 "Payments to Architect-Engineer, Item (c).

2. *Extra Services of the Architect-Engineer.*

1. Architect-Engineer will prepare, without additional charge, as-built drawings showing construction

changes in the work and final locations of mechanical service lines and outlets, and at the conclusion of the work furnish Owner a set of reproducible tracings thereof for the Owner's ownership and future use.

2. The following services, if performed, shall be paid for by Owner at Architect-Engineer's standard per diem rates, plus miscellaneous expenses at direct cost.

   (A) Revising previously approved drawings or specifications to accomplish changes ordered by Owner, in writing, unless due to error of Architect-Engineer.

   (B) Preparing documents for alternate bids requested in writing by Owner.

3. *The Owner's Responsibilities*

   1. The Owner shall provide full information as to its requirements for Project.

   2. Owner shall designate, when necessary, representative authorized to act in his behalf. It shall examine documents submitted by Architect-Engineer and render decisions pertaining thereto.

   3. Owner shall furnish or direct the Architect-Engineer to obtain at the Owner's expense, a certified survey of the site, giving as required, grades and lines of streets, alleys, pavement, and adjoining property, rights-of-way, restrictions, easements, encroachments, zoning, deed restrictions, boundaries, and contours of the building site; locations, dimensions, and complete data pertaining to existing buildings, and utility lines both public and private; and test borings and pits necessary for determining subsoil conditions.

   4. Owner shall pay for structural, chemical, mechanical, soil mechanics or other tests and reports, if required.

5. Owner shall arrange and pay for such legal and auditing services as may be required for Project, other than for performance of duties of Architect-Engineer.

4. *Project Contruction Cost.*

1. Project Construction cost as herein referred to means the total cost of all work designed or specified by Architect-Engineer, but does not include payments made to or to be made to Architect-Engineer or payments made by Owner under (3).

2. Project construction cost shall be based upon one of the following sources with precedence in the order listed:

(a) Lowest acceptable bona fide Contractor's proposal received for any or all portions of Project.

(b) Architect-Engineer's latest statement of probable Project construction cost based on current area, volume, or other unit costs.

3. When labor or material is furnished by Owner, Project cost shall include such labor and material at current market cost.

4. Since Architect-Engineer has no control over the cost of labor and materials, or competitive bidding, he does not guarantee the accuracy of any statements or estimates or probable construction cost.

5. *Payments to the Architect-Engineer.*

1. Architect-Engineer is to be paid a total fee of 6% of Project construction cost for basic services, such payment to be made monthly in proportion to the services performed and in accordance with the following schedule:

(a) Under 1-Basic Services Phase 1-Design, Plans and Specifications, the Architect-Engineer is to be paid a fee of 4% of the actual final close-out construction cost and is to be paid according to the following schedule.

1. Upon completion of preliminary plans of each facility an amount equal to 1% of the estimated construction cost of each facility.

2. Upon filing of final plans for each facility, an amount equal to 2% of the estimated construction cost of each facility.

3. Upon award of construction contract an amount equal to 4% of the construction contract as awarded minus payments previously made on each facility.

(b) Under 1-Basic Service, Phase II Construction, the Architect-Engineer will be paid an amount equal to 2% of the construction cost of each facility and is to be paid according to the following schedule.

1. An amount equal to 2% of the Contractor's monthly request for funds.

(c) Under 2. Extra Services of the Architect-Engineer, the Architect-Engineer will be compensated according to the following per diem rate schedule:

Fees:

1.	Principal of Firm	$25.00
2.	Supervising Engineer or Supervising Geologist	15.00
3.	Senior Engineer or Senior Geologist	12.50
4.	Engineer, Geologist, or Senior Engineering Technician	10.00
5.	Junior Engineer, Junior Geologist or Engineering Technician	8.00
6.	Junior Engineering Technician, Senior Engineering aide or Senior Draftsman	7.00
7.	Engineering Aide, Draftsman or Secretary	6.00
8.	Junior Engineering Aide, Junior Draftsman or Stenographer	5.00

Charges:

1. General Engineering Surveys.

2-Man Field Crew	$15.00
3-Man Field Crew	20.00
4-Man Field Crew	25.00

(Portal-to-Portal basis with overtime charged at 1.25 times the normal hourly rate)

2. Photocopying, Printing, Use of Special Materials and Equipment ..... Actual Cost plus 15%
3. Automobile Mileage ..... $0.125 per mile
4. Travel Expense (Air, Rail, Bus, or Taxi Fares) ..... Actual Cost Plus 15%
5. Subsistence (Meals and Lodging) ..... Actual Cost Plus 15%
6. Rates for court appearances, time in travel status, foreign service, projects of major scope and other details furnished upon request.

For all services render under Basic Services, Phase I and II the engineer will be paid as set forth in (a) and (b) above a total amount equal to 6% of final project construction cost as described under 4, Project Construction Cost for each facility.

6. *Completion Schedule.*

It is estimated that the required time to complete Phase I-Design, Plans and Specifications will be 180 days from the Notice to Proceed or date of acceptance of this contract.

7. *It is further agreed*

1. The project will be accomplished by Phase and no Phase will be started by Architect-Engineer until notice to proceed is issued by Owner in writing.

IN WITNESS WHEREOF, the parties hereto have made and executed this Agreement, the day and year first above written.

OWNER: Gila River Indian Community

/s/ LOYDE A. ALLISON
Governor

Attest

/s/ IMOGENE KYYITAN
Secretary

HENNINGSON, DURHAM & RICHARDSON
Architect-Engineer

By/s/ J. ROBERT KAHL
J. Robert Kahl, Assistant Vice President

FORM ED 122
5-6-66

U.S. DEPARTMENT OF COMMERCE
ECONOMIC DEVELOPMENT ADMINISTRATION

CONTRACT

THIS AGREEMENT, made this 6 day of May, 1969, by and between (1) Gila River Indian Communities, acting herein through its (2) Tribal Council, hereinafter called "Owner" and (3) Ranier Construction Co., Inc., an individual doing business as a partnership, a corporation of the City of Phoenix, County of Maricopa, and State of Arizona, hereinafter called "Contractor".

WITNESSETH: That for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the OWNER, the CONTRACTOR hereby agrees with the OWNER to commence and complete the contruction described as follows:

hereinafter called the project, for the sum of Sixty Thousand seven hundred eight Dollars ($60,708.00) and all extra work in connection therewith, under the terms as stated in the General and Special Conditions of the Contract; and at his (its or their) own proper cost and expense to furnish all the materials, supplies, machinery, equipment, tools, superintendence, labor, insurance, and other accessories and services necessary to complete the said project in accordance with the conditions and prices stated in the Proposal, the General Conditions, Supplemental General Conditions and Special Conditions of the Contract, the plans, which include all maps, plats, blue prints, and other drawings and printed or written explanatory matter thereof, the specifications and contract documents therefor as prepared by Henningson, Durham &

Richardson, herein entitled the Architect/Engineer, and as enumerated in paragraph 1 of the Supplemental General Conditions, all of which are made a part hereof and collectively evidence and constitute the contract.

The Contractor hereby agrees to commence work under this contract on or before a date to be specified in written "Notice to Proceed" of the Owner and to fully complete the project within 150 consecutive calendar days thereafter. The Contractor further agrees to pay, as liquidated damages, the sum of $50.00 for each consecutive calendar day thereafter as hereinafter provided in Paragraph 19 of the General Conditions.

The OWNER agrees to pay the CONTRACTOR in current funds for the performance of the contract, subject to additions and deductions, as provided in the General Conditions of the Contract, and to make payments on account thereof as provided in Paragraph 25, "Payments to Contractor", of the General Conditions.

IN WITNESS WHEREOF, the parties to these presents have executed this contract in six (6) counterparts, each of which shall be deemed an original, in the year and day first above mentioned.

/s/ LOYDE A. ALLISON
(Owner)

(Seal)
ATTEST:

/s/ IMOGENE KYYITAN
(Secretary)

By _____

/s/ SHARRON RIVERS
(Witness)

RANIER CONSTRUCTION CO., INC.
(Contractor)

(Seal)

/s/ ARTHUR A. BLACK
(Secretary)

By /s/ L. E. BLESH

/s/ CHRISTINE MCKAMEY
(Witness)

713 W. Campbell Ave., Phx., Az.
(Address)

(1) Corporate name of Owner.

(2) Title of authorized official.

(3) Strike out inapplicable terms. Secretary of the Owner should attest. If Contractor is corporation, Secretary should attest. Give proper title of each person executing contract.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

GILA RIVER INDIAN COMMUNITY, *Plaintiff,* v. HENNINGSON, DURHAM & RICHARDSON, and RANIER CONSTRUCTION COMPANY, INC., an Arizona corporation, *Defendants.*	No. CIV 76-390 76-390 PHX WPC Filed Nov. 23, 1977 **AMENDED COMPLAINT**

This is a civil action in which plaintiff seeks damages against defendants.

Plaintiff GILA RIVER INDIAN COMMUNITY is organized pursuant to §16 of the Indian Reorganization Act, June 18, 1934 (25 U.S.C. 476), with Constitution and Bylaws approved by the Secretary of the Interior March 17, 1960, and amendments thereto likewise approved. Plaintiff is recognized by the Secretary of the Interior as having authority to represent the confederated Pima-Maricopa Indian Tribes on the Gila River Indian Reservation, Arizona (Reservation), and as having authority and jurisdiction over Reservation subject to its Constitution and Bylaws and to limitations and restrictions of federal law. Plaintiffs' governing body, Gila River Indian Community Council, is duly recognized by the Secretary of the Interior. Defendant HENNINGSON, DURHAM & RICHARDSON (HENNINGSON) is a Nebraska corporation. Defendant RANIER CONSTRUCTION COMPANY, INC. (RANIER) is an Arizona corporation.

II

This court has jurisdiction under 28 U.S.C. §§1331, 1332 and 1362.

III

This action arises under United States Constitution, art. I, §8, cl. 3; The United States Treaty of Peace, Friendship, Limits and Settlement with the Mexican Republic (Treaty of Guadalupe Hidalgo), arts. VIII and IX, February 2, 1848, 9 Stat. 922; The Treaty between the United States of America and the Mexican Republic (Gadsden Treaty), art. V, December 30, 1853, 10 Stat. 1031; Act of February 28, 1859, 11 Stat. 401; subsequent Executive orders creating Reservation; Title 25, U.S.C.; and the federal common law concerning Indian tribes.

IV

Fee title to the specific Reservation real property including the building constructed thereon which is the subject matter of this action is in the United States of America in trust for plaintiff.

V

Plaintiff brings this action pursuant to direction of the Gila River Indian Community Council, plaintiff's governing body recognized by the Secretary of the Interior and under authority of Article XV of its Constitution and Bylaws and federal law.

VI

Plaintiff, in cooperation with the Bureau of Indian Affairs (BIA), in the administration of justice on the Reservation, planned for a youth rehabilitation center to remove youth from the environment of the adult detention facility and for rehabilitation of youth processed through Gila River Indian Community Juvenile Court. The necessary physical plant (Youth Home) was to be and was constructed with loan or grant funds from the United States.

VII

During all times material to this claim HENNINGSON has been in the business and held itself out as a qualified and competent firm of architects and engineers for the purposes of planning and designing buildings, including buildings of the type and size built for plaintiff, and for the supervision of the construction of the same.

VIII

During all times material to this claim RANIER has been in the business and held itself out as a qualified and competent contractor for the construction of buildings, including buildings of the type and size built for plaintiff and for the supervision of construction of the same.

IX

On or about July 12, 1967, plaintiff entered into an Owner-Architect Agreement with HENNINGSON, a copy of which agreement is attached hereto and incorporated by reference. Said agreement provided, among other things, that HENNINGSON was to render professional services in preparing construction drawings and specifications for a Youth Center to be located on the Gila River Indian Reservation, at Sacaton, Arizona. HENNINGSON completed and submitted specifications dated September 26, 1968, together with construction drawings.

X

The U.S. Department of Commerce, Economic Development Administration, authorized the construction of the Youth Center and designated said project as EDA No. 08-1-00447.

XI

In compliance with EDA regulations, the construction of said Youth Center was put out to public bid. On or about March 13, 1969, RANIER was the low bidder. A construction contract was issued to RANIER on or about May 6, 1969, in the amount of $60,708.00, a copy of which is attached hereto and incorporated by reference.

XII

Defendants, through their agents, servants and employees had actual knowledge of the specific uses, purposes and requirements for which said Youth Center was to be planned and constructed. Plaintiff relied upon defendants' skill and judgment that said building would be fit for the use and purpose intended. Defendants impliedly warranted the fitness of said building for said use and purpose.

XIII

On or about November 11, 1969, plaintiff was given occupancy of the Youth Center constructed by RANIER and inspected by HENNINGSON.

XIV

Defendants HENNINGSON and RANIER were paid in full for services in accordance with the respective contracts.

XV

Plaintiff used the building and premises in the manner in which it was intended to be used and, until the latter part of July 1973, was unaware of any defects in the building which would make it unsafe for its intended use.

XVI

On or about July 19, 1973, plaintiff's agents and employees first noticed that the Youth Center was beginning to break up and come apart.

XVII

Plaintiff notified defendants of the problem. On or about August 22, 1973, defendants visited and inspected said building. Defendants advised plaintiff that there was nothing defendants could do to stop the breaking up of or to stabilize the building or to make it tenantable.

XVIII

Plaintiff requested the Area Director, Phoenix Area Office, Bureau of Indian Affairs, United States Department of the Interior, to inspect or have said building inspected. In August 1973, upon the advice of the Phoenix Area Office, United States Department of the Interior, plaintiff abandoned said building and salvaged all usable equipment and materials to mitigate plaintiff's damage.

XIX

The failure of said Youth Center was proximately caused by negligence of HENNINGSON and its failure to properly design or specify the manner and materials to be used in the construction of said building, or in supervising and inspecting during the course of construction of said building and of the defendant RANIER in the construction of said building. Defendants knew or should have known of the defectiveness and probable failure of said Youth Building.

XX

As a result of defendants' negligence and the proximately caused structural failure of said youth home building, plaintiff has suffered damage:

A. In excess of $100,000.00, the cost to remove and replace said building;

B. In excess of $50,000.00, for loss of use of said building and the real property on which the same is situated.

XXI

The United States, as trustee, has failed to take any action to recover plaintiff's damages.

WHEREFORE, plaintiff prays judgment against defendants in the sum of $150,000.00 together with interest and court costs.

COX AND COX

By /s/ Z. SIMPSON COX
Attorneys for Plaintiff

Copies of the foregoing
delivered this 23rd day
of November, 1977, to:

Riney B. Salmon II
Neil Vincent Wake
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Defendant
Henningson, Durham &
Richardson

Thomas W. Murphy
307 Luhrs Building
Phoenix, Arizona 85003
Attorney for Defendant Ranier
Construction Co., Inc.

/s/ Z. SIMPSON COX
Z. SIMPSON COX

[The Owner-Architect Agreement with Henningson, Durham and Richardson which appears at A-28 of this Appendix and the Contract with Ranier Construction Co., Inc., which appears at A-37 of this Appendix were also attached to the tendered Amended Complaint.]

Registrar of Contractors

JAMES A. VIVIAN
REGISTRAR

1818 WEST ADAMS
PHOENIX, ARIZONA 85007
(602) 252-5531

TUCSON OFFICE
415 WEST CONGRESS 85701
(602) 882-5378

November 23, 1973

Mr. Richard Baker, Director
Gila River Community Youth Home
P.O. Box 5
Sacaton, Arizona 85247

Dear Mr. Baker:

I was quite interested in your letter of 13 November and the regrettable incident involving the deterioration of the Youth Home.

The purview of our office is the examination and licensing of contractors. We do investigate sworn complaints against licensed contractors, although we have no authority to pursue such matters against authorized representatives of the U.S. government. I assume from your letter that Ranier was under contract on a federal reservation, and the contract was funded through the Bureau of Indian Affairs, thus falling in the exempt category. Additionally, the statute of limitations for filing a complaint is 2 years from the alleged act.

However, if my assumption is incorrect, if the act did in fact occur less than 2 years ago (which it apparently did not), and if you file a sworn complaint, we will certainly look into the matter further. In this connection, I have discussed the matter with Henningson, Durham, and Richardson, and they apparently have not fixed responsibility for the failure.

Perhaps an independent investigation under the auspices of the Bureau of Indian Affairs is indicated.

However, if you will call me we will be pleased to help in any way that we can under the law.

Sincerely yours,

/s/ JAMES A. VIVIAN
JAMES A. VIVIAN
REGISTRAR OF CONTRACTORS

JAV/bjp
Encl. - Complaint forms